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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1268

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, a public body corporate, *et al.*,
Petitioners,

VERSUS

ROBERT L. DOWELL and VIVIAN C. DOWELL, Infants, by A. L. Dowell, their Father and Next Friend, EDWINA HOUSTON HELTON, a minor, by the Mother, Gloria Burse, and GARY RUSSELL, a minor, by his Father, George Russell,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Board of Education of the Oklahoma City Public Schools, Independent District No. 89, Oklahoma County, Oklahoma, a public body corporate,[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on January 23, 1967.

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[1] Other petitioners are: Jack F. Parker, Superintendent of the Oklahoma City, Oklahoma Public Schools; M. J. Burr, Assistant Superintendent of the Oklahoma City, Oklahoma Public Schools; Melvin P. Rogers, Phil C. Bennett, William F. Lott, Mrs. Warren F. Welch and Foster Estes, Members of the Board of Education of Oklahoma City Schools; Independent District No. 89, Oklahoma County, Oklahoma, and their Successors in Office.

CITATIONS TO OPINIONS BELOW

There were two opinions of the District Court. The first (R. 50) is reported in 219 F.Supp. 427. The second (R. 147) is reported in 244 F.Supp. 971.[2] The opinions of the Court of Appeals[3] are unreported and are printed in Appendix "A" hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1967. Rehearing was denied on March 15, 1967. The Judgment and Orders denying rehearing are printed in Appendix "B" hereto. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Jurisdiction of the District Court was invoked under 42 U.S.C. 1981, 42 U.S.C. 1983, Title 28 U.S.C. 1343(3), Title 28 U.S.C. 1331, and the Fourteenth Amendment to the Constitution.

QUESTIONS PRESENTED

1. Whether the District Courts of the United States have authority to impose on a Board of Education the affirmative duty to recast or realign school attendance districts for the purpose of mixing or blending Negro and white students in a particular school or schools.

2. Whether the District Courts of the United States have the authority to order a Board of Education to adopt a transfer policy under which pupils assigned to schools in which their race predominates are given the

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[2] Ten copies of the printed record are being filed with this petition, and the reported opinions are therefore not printed herein.

[3] There are three, the majority, concurring, and dissenting.

right to transfer to schools in which their race is in the minority, absent any showing or effort to show the existence of unlawful discrimination.

3. Whether the District Courts of the United States have the authority to direct a Board of Education to assign faculty personnel among the schools of the entire school district so that by a prescribed time the ratio of whites to non-whites in each school will be the same, with a reasonable leeway, as they comprise at the time of the court's order, in the whole school system, absent a finding that unlawful discrimination in the assignment of Negro teachers has occurred or is occurring.

4. Whether a District Court of the United States, notwithstanding an affirmative finding that a Board of Education has in good faith attempted to operate a school system in accordance with the directions of such court, may peremptorily order the Board to take affirmative, specified action, the only objective of which is to reduce or eliminate racial imbalance.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The statutes and Constitutional provision involved are printed in Appendix "C" hereto.

STATEMENT

The original complaint (R. 1) was filed on behalf of four minor Negro plaintiffs by their parents and next friends against the Board of Education of the Oklahoma City Public Schools, the Superintendent and Assistant Superintendent thereof, and the members of the Board of Education. It was alleged that the defendants had been and were then pursuing a policy, practice, custom and usage of

operating a qualified bi-racial school system in Oklahoma City, that attendance areas of certain schools overlapped, and that white and Negro children were required to go to schools attended only by members of their own race. Plaintiff A. L. Dowell, father and next friend of two of the plaintiffs, specifically alleged that he had sought transfer of his children from Douglass High School, an all-Negro school, to Northeast High School, attended by children of both races, and that the application was denied unless Robert L. Dowell took a course in electronics, solely because he was a member of the Negro race. The relief sought was that the petitioners, who were there defendants, be enjoined from operating such a system and from granting or denying transfers on the basis of race and color.

In their answer (R. 7) defendants denied the allegations of discriminatory practices and affirmatively alleged that the application of Robert L. Dowell for transfer had been granted. This affirmative allegation was never controverted.

A First Amended Complaint (R. 9) was filed in which certain statutes of the State of Oklahoma requiring the maintenance and operation of separate schools were alleged to be unconstitutional. At pre-trial, the Board conceded the unconstitutionality of the statutes under attack (R. 22).

A Second Amended Complaint (R. 33) alleged that the Board had adopted and often enforced a policy, practice, custom and usage of assigning students, faculty and administrative personnel on the basis of racial identity of the racial group of which the student body is composed, and that by reason thereof the schools in the district were

"racial segregated schools contrary to and in violation of the Constitution and laws of the United States."

In its Answer (R. 41) the Board generally denied the allegations of the Second Amended Complaint, and among other things, affirmatively alleged that every pupil residing within an attendance area must attend the school serving that area unless granted a transfer, none of which had been granted because of race or color.

An evidentiary hearing was held on May 10, 1963, following which the court rendered an opinion (R. 50) and directed the Board to file a complete and comprehensive plan for the integration of the Oklahoma City school system, both as to student body and teaching and supervisory personnel.

The Board filed a program of compliance (R. 46) and a Clerk's minute for August 8, 1963 (R. 50) recites:

> "Court approves School Board plan but will file his findings in a few days."

On February 14, 1964, a further hearing was held, at the conclusion of which the court observed:

> "I believe that the report that has been filed here with the court of the School Board's intentions that it is filed in good faith, that they intend to integrate these schools in good faith" (R. 193).

On February 28, 1964, a further hearing was held, at which the court suggested that the Board of Education employ an expert to make a study of what it referred to as "these problems" (R. 200). The Board, by letter of March 26, 1964 (R. 83), respectfully declined to employ outside experts. The court then entered an order (R. 90) desig-

nating three persons suggested by the plaintiffs to make "a study of the situation" and report to the court. Such a study was made and a report filed (R. 92). Following a hearing on the report held on August 9 and 10, 1965 (R. 203-362) the court rendered its final opinion (R. 147) and entered its order (R. 162).

The order directed that the Board prepare and submit by October 30, 1965, "a further desegregation plan purposed to completely disestablish segregation in the public schools of Oklahoma City, Oklahoma, as to both pupil assignment and transfer procedures, and hiring and assignment of all faculty personnel," and that "Said plan shall further specifically provide for:

"1. New school district lines for the Harding and Northeast High School attendance districts and the Classen and Central school attendance districts drawn in accordance with recommendations relating to said school attendance districts as contained in the Integration Report to the end that effective no later than the start of the 1966-67 school year:

"a. The Harding (7-12) school attendance district and the Northeast (7-12) school attendance district shall be combined into one school attendance district, the northern boundary of which, upon the opening of the Eisenhower Junior High School, shall be 50th Street. In the new Harding-Northeast school attendance district, Harding shall house all pupils residing in the said new district and eligible to be enrolled in either grades 7-9 or 10-12, and Northeast shall house all pupils eligible to attend either grades 7-9 or 10-12. The decision as to which school shall serve grades 7-9 and which school shall serve grades 10-12 shall be left to the sound discretion of the school board, based on an appraisal of existing permanent facilities and the location of other secondary school facilities;

"b. The Classen (7-12) school attendance district and the Central (7-12) school attendance district shall be combined into one school attendance district. In the Classen-Central school attendance district, Classen shall house all pupils residing in said new district and eligible to be enrolled in either grades 7-9 or 10-12, and Central shall house all pupils eligible to attend either grades 7-9 or 10-12. The decision as to which school shall serve grades 7-9 and which school shall serve grades 10-12 shall be left to the sound discretion of the school board, based on an appraisal of existing permanent facilities and the location of other secondary school facilities.

"2. A new 'majority to minority' transfer policy, under which policy all pupils initially assigned to schools where pupils of their race predominate (over 50%) shall be permitted to request and obtain transfer, if space permits, to schools in which pupils of their race will be in a minority (under 50%), and such transfer shall make that his permanent home school for the grades it provides. Such transferee shall have all of the rights of the school, academic programs, and athletic programs, notwithstanding any rules to the contrary, inasmuch as the law of desegregation supersedes any rules requiring residence and time.

* * * * * *

"4. Faculty desegregation of all faculty personnel, i.e., central administration, certified nonteaching and teaching personnel, so that by 1970, the ratio of whites to non-whites assigned in each school of the defendants' system will be the same, with reasonable leeway of approximately 10% as the ratio of whites to non-whites in the whole number of certified personnel in the Oklahoma City Public Schools."

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in direct conflict with:

(a) That of the Seventh Circuit in *Bell* v. *School City of Gary, Indiana*, 324 F.2d 209, *cert. denied* 379 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216.

(b) That of the Sixth Circuit in *Kelley* v. *Board of Education*, 270 F.2d 209, *cert. denied* 361 U.S. 924, 80 S.Ct. 293, 4 L.Ed.2d 240.

(c) Its own in *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988, *cert. denied* 380 U.S. 914.

(d) The clearly expressed intention of Congress.

In *Bell*, the Court pointed out:

> "Plaintiffs are unable to point to any court decision which has laid down the principle which justifies their claim that there is an affirmative duty on the Gary school system to recast or realign school districts or areas for the purpose of mixing or blending Negroes and whites in a particular school.",

and said:

> "We agree with the argument of the defendants stated as 'There is no affirmative United States constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils.' "

The Court approved the statement found in *Brown* v. *Board of Education* (D.C.), 139 F.Supp. 468, that:

> "Desegregation does not mean that there must be intermingling of the races in all school districts. It

means only that they may not be prevented from intermingling or going to school together because of race or color."

In *Kelley*, the Court quoted with approval the same statement from *Brown* v. *Board of Education, supra*, as had the Seventh Circuit in *Bell*, and adopted and approved a statement contained in *Briggs* v. *Elliott*, 132 F.Supp. 776 where, in referring to the rule announced by this Court in the desegregation cases, the Court said:

> " 'It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend.
>
> * * * * * * *
>
> " 'The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation.' * * *"

In *Downs*, the Tenth Circuit itself, in rejecting a contention that even absent intentional segregation there was still segregation in fact in the Kansas City school system, and that under the principles of *Brown* the Board had a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention, said:

> "While there seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools, and Negro children have no constitutional right to have white children attend school with them."

Although not controlling, and if constitutional rights are violated, clearly ineffective, Congress in the Civil Rights Act of 1964 was careful to spell out the limits of the Act. It defined desegregation as follows:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C.A., Sec. 2000c(b).

And in order to make its intention perfectly clear, further said:

> "Nothing in this subchapter shall prohibit classification and assignment for reasons other than race, color, religion, or national origin." 42 U.S.C.A., Sec. 2000c-9.

The majority opinion in this case has approved action of the District Court which, under the record, can be designed and intended only to blend or mix the races in the designated areas. It may be that the court below acted under the mistaken belief that the District Court found and believed that the Board had not acted in good faith in attempting to implement the decision in *Brown*.[4] Completely contrary to any such finding or belief is the statement of the District Court that:

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[4] The concurring opinion clearly reflects that this was true, since the writer says: "I start with the premise of the trial court's finding that the Board of Education, despite statements of completely acceptable policy, had not acted in good faith in effectuating such policies after having been afforded opportunity to do so." The dissenting Judge apparently acted under the same misconception as the majority, but found no support for such a finding in the record.

> "The School Board has instituted the changes in its policy and administration required by this Court's order of July, 1963, and has in good faith attempted to administer the school system in accordance with these changes" (R. 149).

Regardless of the reasons which impelled the majority to affirm the District Court's order, the opinion runs counter to those of other circuits and their own in *Downs*. This irreconcilable conflict should in and of itself warrant and require the granting of the writ.

2. Ever since *Brown*, the questions here presented have plagued the courts, as well as elected school officials, throughout the country, and are causing untold confusion and disagreement among those courts which have been confronted with them. This Court should delineate and refine the teaching of *Brown*. Answers to the questions presented will undoubtedly reduce the enormous volume of racial litigation and provide specific guidelines for officials who are primarily expected to carry out the mandates of this and other courts.

The uncertainty which prevails was recognized by the District Court when, in its opinion, 244 F.Supp. at 978, it said:

> "While the full implications of the Supreme Court's decision in Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 973 (1954) remain uncertain, this court concludes that action thus far taken by the defendant School Board falls far short of providing the desegregated education envisioned in the Brown opinion as the constitutional right of plaintiffs and the class they represent."

The importance of deciding the questions presented is clear.

3. The decision of the court below is believed to be erroneous and those of the Sixth, Seventh, and indeed that of the Tenth Circuit itself in *Downs*, correct. It is felt that the conflict grows out of confusion concerning the use and true meaning of the terms "discrimination," "segregation," "desegregation," and "integration."

Former Associate Justice Whittaker, evidently feeling the same way, in an article published in the March issue of Pageant Magazine, wrote:

> "We hear much confused argument revolving around the terms 'discrimination,' 'segregation,' 'desegregation,' and 'integration.' So I think it may be well briefly to consider what they really mean.
>
> "The dictionary sense of the term 'discrimination' is also, in the abstract, its legal sense. In its constitutional sense it is one of the things prohibited to the states by the Fourteenth Amendment's guarantee of 'the equal protection of the laws.'
>
> "The term 'segregation' is, in legal effect, only a synonym for constitutionally prohibited 'discrimination.' The term 'desegregation' is a coined one of awkward and dubious meaning.
>
> "But the term 'integration,' a term of no constitutional significance, though commonly used as a synonym of 'antidiscrimination' or 'antisegregation,' literally has a very different meaning and embraces the concept of amalgamation, well-illustrated by the transfer of schoolchildren from their home district to a distant district for the purpose not of avoiding unconstitutional 'discrimination' but of affirmatively 'mixing' or 'integrating' the races when indeed no provision of the Constitution so requires.

> "Yet in recent times we have seen obvious attempts largely through the repeated use of the coined and meaningless phrase 'de facto segregation'—to torture the word 'integragtion' into a meaning synonymous with constitutionally prohibited 'segregation,' when in truth they speak entirely different concepts. There is, of course, a clear basis in the fundamental law of our land, particularly in the Fourteenth Amendment, for striking down state acts of 'discrimination,' and hence also of 'segregation,' in all public institutions, including state public schools, as violative of that Amendment's guarantee of the equal protection of the laws.
>
> "But, as stated, there is no provision in the Constitution which in terms of intendment compels 'integration' of the races."

The foregoing quotation is not urged as compelling authority, but is used because the author expresses much more clearly and concisely what the writer of this petition believes to be true, than he could.

Supposedly all would agree that the constitutional rights of Negroes should and must be protected. However, in every case it is imperative that a clear understanding of the rights involved must precede an intelligent evaluation and analysis of the facts in order that the nature and extent, if any, of relief may be determined. In every case involving the equal protection clause of the Fourteenth Amendment, the first and basic question which must be resolved is: Have the complainants been subjected to discriminatory practices which deny them the equal protection afforded by the Fourteenth Amendment?

It is the sincere belief of petitioners that in many of the cases in which racial questions have been raised the courts have, in their zeal to evidence their concern for the plight of many Negroes, overlooked the fact that:

> "The sound test of judicial responsibility is not, of course, its lavishness of concern, but its measured adherence to the actual legal need of, and its authority in, the situation with which it is required to deal. Over-responsibility may be as much an abuse of judicial power and function as irresponsibility."[5]

The action of the District Court, particularly in the area of recasting the existing school attendance areas and directing the Board how to use the existing facilities gradewise, can hardly be accounted for except that its over-concern motivated such action, which constituted an abuse of its judicial power and function and an unauthorized invasion of the powers and functions of the Board.

The constitutional protection afforded by the Fourteenth Amendment requires that equal treatment—nothing more—be accorded all citizens. It is interesting to note that neither the District Judge nor either of the concurring Judges point to a single instance of discriminatory treatment. This is accounted for by the fact that nobody—pupil or teacher—said that there was any. As the dissenting Judge pointed out:

> "The trouble with this case is that it deals with generalities rather than specific. Discriminatory practices are barred and must not be condoned. Here the court does not find any explicit discriminatory act. It says that the Board has not acted in good faith in the preparation of a plan for integration and forces details of a plan on the Board. I believe that the courts should confine their decisions to actual controversies related to specific rights, and should not take over the operation of public affairs entrusted to other governmental institutions."

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[5] *Walling* v. *Benson* (C.A. 5), 132 F.2d 501 at 504.

Concerning that portion of the District Court's order directing a consolidation of four existing school attendance areas, he said:

> "The court said that the plan should provide new district lines for four schools. The effect is to consolidate in two instances a Junior High School District with a Senior High School District. No finding is made as to the physical characteristics of the facilities or to the types of curriculum. In my opinion, this is a gratuitous judicial interference with the duties and responsibilities of the Board, is made without any supporting findings except the possibility of thereby in the future reducing the imbalance of the races, and is not required to protect any Fourteenth Amendment right."

It is believed these observations are well taken and clearly pinpoint the error into which the majority of the court below fell.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April, 1967